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IN THE

Supreme Court of the United States

October Term, 1968

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FREDERICK T. ZUBER, ET AL.,

Petitioners,

v.

RUSSELL ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RESPONDENTS RUSSELL ALLEN, ET AL., IN OPPOSITION TO BRIEF AMICUS CURIAE OF ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The respondents initially note that Rhode Island nearby producers supply but about 2 percent of the milk for the Massachusetts–Rhode Island marketing area, and that their number are steadily dwindling as a reliable source of the milk supply. On January 1, 1965, there were 262 nearby producers located in Rhode Island, and this number was decreased to 203 as of January 1, 1967, a drop of 59 producers in the two-year period preceding the escrowing

of respondents' monies in this case. The brief *amicus curiae* states that Rhode Island's "many producers" now number but 178, a decline of 25 in the two-year period that the nearby differentials have not been paid to Rhode Island producers. The respondents respectfully submit that these figures reflect that Rhode Island producers are in no manner dependent upon non-nearby dairy farmers for economic survival.

The brief relates primarily to an interpretation of the plain language of the Act concerning payment of a uniform price to all producers for all of their milk irrespective of the use thereof by the handler to whom they deliver the same. This matter has been treated in the other briefs filed herein by respondents, and they respectfully maintain that such interpretation is in conflict with the many statements of this Court in various milk cases and is totally devoid of reason because of its failure to realize that the entire Congressional program would be completely nullified by such interpretation.

Respondents respectfully say that the quotation of a few sentences of this Court's opinion in the case of *Lehigh Valley Farmers Cooperative v. United States,* 370 U. S. 76 (1962), is taken entirely out of context and that it is clear that said decision supports the respondents' position in this case concerning payment of a uniform price irrespective of use, for the Court stated as follows in respect to the Congressional program that provided for such uniformity of price:

> "The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. *But the farmer who produces the milk is protected from the effects of competition for premium outlets since he is automatically allotted a proportional share of each of the different 'use' markets.*"

The *amicus curiae* fails to understand that all producers serving the same handler under individual-handler pooling also receive a uniform price irrespective of the use made of their particular milk by the handler to whom they deliver. Nor is there a wide variance in price among handlers in the few markets which have individual-handler pooling, in that such type of pooling must be approved by at least three-fourths (instead of two-thirds) of the producers serving the marketing area. Additionally, individual-handler pooling must be approved by such producers in a separate referendum on this issue alone and not by acceptance or rejection of all provisions of an order at the same time as in marketwide pooling of milk. This type of handling is appropriate for areas having a short supply of milk and where supplies are evenly distributed among the handlers, a feature not prevailing in the Massachusetts–Rhode Island market. Moreover, the Secretary specifically found that institution of such type pooling in New England would create disorderly marketing and would be financially injurious to producer and consumer alike. (App. E, p. 19e).

The contentions of the *amicus curiae* concerning the remarks of Representative Plumley in the Congressional Record are both irrelevant and inaccurate. This individual acknowledged the need for federal regulation under then existing circumstances, and the respondents have always acknowledged that all producers were in dire financial straights prior to the Congressional legislation. Representative Plumley was actually against the various features of the Act, however, although he noted its need at the time. Respondents are of the view that federal regulation is still beneficial to all dairymen, and they fail to perceive the significance of such citation from the Congressional Record, other than to respectfully suggest that its citation illustrates the dearth of any substantial support for the contentions of petitioners. The admitted interpretation necessary in respect to Representative Plumley's remarks and those of Senator Copeland illustrate such lack of support with even greater clarity.

The reference of the *amicus curiae* to the cases discussed in *Rock Royal* also reflects a failure to appreciate the constitutional arguments made by the handlers in the lower court in that case, and the rejection of the applicability of the various cases voiding equalization for lack of due process or for violation of other Constitutional limitations. Those cases were distinguished in *Rock Royal* because of its recognition that the very disorder of the market and poor financial position of all producers predominated over the narrow interests of a few individuals. The welfare of the milk consuming public was involved, and, in short, the public interest predominates over private interests under such circumstances.

In respect to the contention of the *amicus curiae* that Rhode Island producers obtained higher prices for their milk prior to federal regulation under the Southeastern New England, the respondents' merely cite the following from the same decision of the Secretary cited by the *amicus curiae,* the decision evidencing that Rhode Island producers could not market their milk under the higher prices of the state's preferential price program for local producers; that the higher prices were also in part attributable to the fact that Rhode Island would obtain much of its milk as needed from the Greater Boston market, thus forcing the respondents to bear the burden of surplus that should have been properly associated with the Rhode Island and Southeastern New England markets, and that Rhode Island producers would have lost their markets to non-nearby producers in the absence of federal regulation:

> "The Southeastern New England market is an interstate market encompassing all of the State of Rhode Island and a substantial area in Southeastern Massachusetts. Within this market there is a substantial and continuing interstate commerce, both in the procurement of milk and in the sale of fluid milk and its products."
>
> * * *

"More than one-third of the fluid requirements for the Southeastern New England area originates from sources outside the States of Massachusetts, Connecticut and Rhode Island. Much of the up-country milk is assembled and received at country plants in Vermont and New Hampshire and is then transported to the Southeastern market for processing and distribution. Additional quantities are handled by bulk farm tank pick-up and moved directly from farms in northern New England to plants in the local market.

The situation in both Fall River and New Bedford has continued to deteriorate as handlers, seeking to avail themselves of milk supplies at the most advantageous price, have tended to look to up-country unregulated supplies . . . As a result, local producers have had difficulties in maintaining regular outlets for their productions. . . . Much of this (local) milk is sold at *manufacturing* milk prices *even though the local supply is inadequate to meet the market demands.*

The situation in the Rhode Island part of the market is substantially similar to that in the Fall River–New Bedford area. Early in 1951 the association representing a large segment of the registered Rhode Island producers requested a hearing to consider a Federal order for that market because of the then existent market disorder. On the basis of the facts presented at that hearing it was recommended that an order be issued. However, following that decision the association negotiated a settlement with local handlers which minimized the effect of the disorder and accordingly the association asked that the order not be issued.

The increase in available milk supplies generally and the fact that milk is readily available from up-country sources at prices approximating the Boston blend has provided a strong incentive for handlers

to drop local producers in favor of cheaper sources of supply.

"Less than one-third of the fluid requirements of Rhode Island dealers are supplied by Rhode Island dairy farmers. An additional forty-five percent is supplied by dairy farmers located in nearby Massachusetts and Connecticut and the remainder is secured from other sources, primarily from the States of Vermont and New York. Several of the larger handlers in the market customarily have secured a lesser proportion of their necessary supplies from local producers than have other handlers. The buying advantage that these handlers have had on their purchases of outside milk has prompted other handlers to drop local producers in favor of sources of supply at upcountry points also.

* * *

Relatively large quantities of local producer milk were dropped during the latter months of 1957 and early 1958; in some cases entire pickup routes were dropped at one time.

Registered Rhode Island producers have enjoyed a preferential market over an extended period of years. The allocation program and the procedure employed by the responsible officials of the State in issuing permits for importation of nonregistered milk have tended to maintain such preferential market to the detriment of other dairy farmers whose production is an essential part of the market supply."

* * *

"Local producers, however, do not carry an unreasonable volume of the necessary market surplus. The overall Class II utilization for the market is only 5.8 percent of total market utilization and less than 10 percent of receipts from registered producers which, from experience in other federally regulated fluid markets, is substantially less than the necessary

reserve which a market such as Rhode Island must carry to assure a continuing adequate supply to meet daily and seasonal fluctuations in supply and demand. Hence, the market relies primarily on upcountry unregulated supplies and surrounding Federal order markets to provide the necessary reserves. . . .

"A market structure which grants a preferential price to registered Rhode Island producers cannot provide a stable market for such producers over any extended period while handlers have the opportunity to gain a procurement advantage through the use of lower priced milk from upcountry sources. The State, as a practical matter, cannot effectively regulate milk which moves across State lines, and while local dealers may voluntarily reduce imports of outside milk temporarily to gain support from local producers, it is inevitable that the incentives for using unregulated milk will result in a loss of market for local producers.

The Southeastern New England market is a deficit market and must rely on sources of supply in northern New England and New York to supplement the local supply. Recent developments in bulk tank cooling and transportation facilities have contributed to efficiencies which permit greater flexibility of handler operations at greater distances from the consumption center in Southeastern New England."

* * *

"The marketing situation as it now exists constitutes a serious and continuing threat to the stable and orderly marketing of milk and to the maintenance of an adequate supply of pure and wholesome milk for the Southeastern New England marketing area.

The issuance of a marketing agreement and order for the Southeastern New England marketing area will contribute to greater stability of the fluid milk market and will tend to effectuate the declared policy of the act. The adoption of a classified pricing plan

based on audited utilization of handlers will provide a uniform system of pricing throughout the area and assure a fair and equitable return to all producers."

The foregoing findings of the Secretary disclose the utter lack of merit in the contentions of the *amicus curiae.*

Respectfully submitted,

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March, 1969